SOAH DOCKET NO. 458-08-1438

TEXAS ALCOHOLIC BEVERAGE COMMISSION, PETITIONER & DR. LYNN MOORE, PROTESTANT,	§	BEFORE THE STATE OFFICE
	§	OF
REGARDING THE RENEWAL APPLICATION OF TKT PRIVATE CLUB, INC. HAMILTON COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Dr. Lynn Moore (Protestant) protested the renewal application filed by TKT Private Club, Inc., with the Texas Alcoholic Beverage Commission (TABC or Commission), asserting that the Applicant maintains a noisy establishment in violation of Sections 11.61(b)(9) and 101.62 of the Texas Alcoholic Beverage Code. The Administrative Law Judge (ALJ) finds that the renewal application should be granted.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Applicant holds Private Club Registration Permit, Beverage Cartage Permit, and Food and Beverage Certificate 606556 for the premises at 4007 Hwy 36 West, Hamilton, Hamilton County, Texas. The hearing on the protest convened on February 13, 2008, in Waco, Texas before ALJ Kerry D. Sullivan. Jennifer Melde, the Applicant's manager, represented the Applicant. Dr. Moore appeared and represented herself. TABC Staff Attorney Susan Stith represented Staff, but Staff took no position on the protest. Notice and jurisdiction are addressed more completely in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Summary of Evidence

The Applicant operates an equestrian events center outside of Hamilton, Texas. The center includes a private club and restaurant on the east side of facility. The facility hosts events such as roping competitions, ranch rodeos, and cutting horse competitions. The permitted club and restaurant consists of about three acres of the much larger covered facility. The club is open Thursday through Saturday each week. A live country music band performs some Saturday nights and occasionally on Friday night. There were live performances on 28 days in 2007. The live performances occur between 9:00 p.m. and 1:00 a.m. On warm nights, club management raises the three fourteen-foot wide retractable doors on the east side of the club for ventilation and to allow patrons to enjoy the music on the outside patio.

The noise from the live performances spurred Dr. Moore to protest the renewal of the Applicant's TABC license. Dr. Moore and her husband, James Moore, own a tract of land across the highway from the facility. They have lived on this land for a long time. In 2006, about the same time as the facility was constructed, they built a new house at the top of the hill on the far side of their property. James Moore testified that he measured the distance from their new home to the club at 1.2 miles. Jennifer Melbe, the club manager, presented a map from the Hamilton County Appraisal District which appears to indicate the club is just under half a mile from the Moore's new home.

Whatever the distance, Dr. Moore testified that the contour of the hill on which she and her husband live acts as a "perfect amphitheater" to funnel sounds from the club to their home. The Moores testified that they are extremely frustrated with the noise level from the club on live band nights. This frustration is captured in Dr. Moore's first complaint about the facility, which she sent to the TABC by email on September 24, 2005:

> I am writing you this at the wee hours this morning as I have not been able to sleep due to the incredibly loud noise (amplified music) from the Circle T Arena and Bar in Hamilton County, Texas.
>
> It is now 1:27 a.m. in the morning and I have been in my bed with all the windows and doors closed, AC fan running with my pillow over my head and the noise still keeps me from sleeping for hours. I can clearly hear the lyrics of the song. . . "Up against the wall, redneck mothers. . .".

The Moores testified that the noise is worst when the club's big doors, which face their property, are open. They have frequently called law enforcement and TABC officials regarding the noise from the facility. They were also given the cell phone number of the club manager, initially, a man named Bryan, now Ms. Melde. Ms. Moore testified that these individuals were generally responsive when she called to complain and would agree to turn the music down. Sometimes, but not always, this would lower the sound below what they considered to be a nuisance level. Dr. Moore said that Bryan would sometimes lower the club doors in response to his complaints and that this lowered the noise level dramatically.

Two TABC agents also testified in this proceeding. Agent Michael Deans stated that he investigated each time the Moores complained but identified only one noise violation, which occurred when Dr. Moore called him and let him listen to the music over the cell phone, which he considered "pretty loud." He stated that he was generally assessing the complaints in terms of the criminal standard, where there is an assumption that 85 decibels disturbs the peace. He testified that the noise from the club never violated this standard, and he believed the club management was doing what it could to address the noise concern. In particular, they bought and used a decimeter to measure and adjust the decibel level of their music.

TABC Lt. Brian Bond testified that he also participated in the investigation. In particular, he visited with the Moores at their new home one evening while a band was playing and the music was quite audible and clear. He said he was surprised that, at one point while he and Mr. Moore were outside the house and about fifteen feet apart, he had to raise his voice to have a conversation

with Mr. Moore. Lt. Bond stated that the music was loud enough that he believed it would have interfered with his ability to sleep.

Finally, Jennifer Melde, the current manager of the club, testified on behalf of Applicant. She confirmed that the club opens the retractable doors on summer evenings for ventilation and to provide patrons an opportunity to sit on the patio and enjoy the music and the night sky. She stated that, when the doors are open, about sixty percent of the customers sit outside in the open patio area. Ms. Melde insisted that the club is interested in working cooperatively with the Moores, but that closing the doors is not an option because it would be very bad for business.

Ms. Melde also confirmed that the club has purchased a decimeter and measures the decibel level each evening on which there is live music. From a designated location on the property outside the open doors, she records the highest decibel level registered as she monitors the instrument during two or three songs. This level has ranged from 63 decibels for a relatively quiet band to 81 for the loudest band, with most registering in the upper 60s. Ms. Melde stated that she considered the band that registered 81 decibels too loud and that it has been banned from further performances at the club. For comparison purposes, Ms. Melde measured the decibel level at the highway that separates the club from the Moore property. She found that it registered 56 there when the level at the designated point on the club property was 70 decibels. In contrast, she stated that the sound from a truck passing on the road registered 95 decibels.

B. The Legal Standard.

The sole potential basis raised for the denial of the Applicant's renewal application is the level of noise from the facility. The applicable noise provisions are Texas Alcoholic Beverage Code Sections 101.62 and 11.61(b)(9), respectively, which provide as follows:

> OFFENSIVE NOISE ON PREMISES. No licensee or permittee, on premises under his control, may maintain or permit a radio, television, amplifier, piano, phonograph, music machine, orchestra, band, singer, speaker, entertainer, or other device or person that produces, amplifies, or projects music or other sound that is ***loud***,

> vociferous, vulgar, indecent, lewd, or otherwise offensive to persons on or near the licensed premises.[1]
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> *********
>
> The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . . (9) the permittee maintains a ***noisy***, lewd, disorderly, or unsanitary establishment or has supplied impure or otherwise deleterious beverages. . . .[2]

A criminal provision that applies to everyone but is not specifically at issue in this administrative licensing hearing is Section 42.01 of the Penal Code pertaining to disorderly conduct. It provides in part:

> (a) A person commits an offense if he intentionally or knowingly: . . . (5) makes unreasonable noise in a public place . . . or in or near a private residence that he has no right to occupy. . .
>
> (c) For purposes of this section: (1) an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence; and (2) a noise is presumed to be unreasonable if the noise exceeds a decibel level of 85 after the person making the noise receives notice from a magistrate or peace officer that the noise is a public nuisance.

C. Analysis.

The statutory provisions pertaining to the amount and type of sound that may permissibly escape a licensed premises are rather broad and highly subjective. Taken literally, the sound level must be neither "loud" nor "noisy." The caption of Section 101.62 indicates the context for assessing whether the sound leaving a facility is loud relates to its potential to be "offensive." Given this broad and subjective standard, it is not surprising that the TABC agents dealing with this issue

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[1] TEX. ALCO. BEV. CODE § 101.62 (emphasis added).

[2] TEX. ALCO. BEV. CODE § 11.61(b(9) (emphasis added).

related it primarily to the criminal standard, which contains the objective benchmark of 85 decibels. As the parties agree, however, the criminal standard is distinct from the unquantified requirements of the Texas Alcoholic Beverage Code, quoted above.

While the ALJ acknowledges the very real irritation the music from the facility causes to the Moores, the ALJ does not believe it rises to a level that warrants denial of the renewal application. There is no evidence that the music the bands play is vulgar or is typically amplified at an unusually high volume. The problem is the open doors, the quiet country setting, and the topography of the area which seems to funnel the music to the Moores home at close to the same level at which it leaves the licensed premises.

The Moores are the only persons to complain of noise from the club, and management has been reasonably responsive to their complaints. They monitor the decibel level and lower the volume when the Moores complain that it is excessive. They have also taken the fairly significant step of banning the loudest band that has played at the facility even though it had not violated the presumptive criminal standard for nuisance. Additionally, as the Applicant points out, the concerts occur at the rate of only about one every two weeks.

Even so, the ALJ accepts the testimony of the Moore's, as confirmed by Lt. Bond, that the sound from live performances can be quite audible at the Moores' hill-top home. Whatever the exact distance to their house and the amphitheater quality of the landscape, the Moores and their guests should not have to raise their voices in order to have a conversation from their back porch. Nor should they, against their will, be required to endure even a moderately volumed country and western concert from inside their house with the windows shut.

Accordingly, this case truly calls for a flexible resolution with on-going communication between the parties. While requiring that the doors be closed during live performances would resolve the noise problem from the Moores' perspective, the ALJ accepts that such a requirement would be seriously harmful to the Applicant's business and should not be required at this point. Another option would be the imposition of a decibel limitation on the level of noise leaving the

licensed premises. Based on Ms. Melde's agreement that the band that hit 81 decibels were too loud and her testimony that most bands peaked in the high sixties, a limit of 70 decibels at the measuring point on the licensed premises would seem to be workable and an appropriate starting point from which to experiment with an appropriate decibel limitation for the music.[3]

While the Moores object to having to call the Applicant's representatives in order to get the music turned down, experimentation and effective communication appears to be the most likely way the parties could achieve a compromise satisfactory to both sides and avoid the cost and uncertainty of future protest hearings or enforcement actions. In the mean time, and as a starting point, the ALJ recommends a finding that the music from the licensed premises should be limited to 70 decibels in order to comply with the statutory requirements prohibiting loud and noisy establishments. With this limitation, the ALJ recommends that the renewal application be granted.

IV. FINDINGS OF FACT

1. Dr. Lynn Moore (Protestant), protested the renewal application filed by TKT Private Club, Inc. (Applicant), with the Texas Alcoholic Beverage Commission (TABC or Commission).

2. TABC's staff sent notice of hearing concerning the protest to the Applicant and Protestant on January 24, 2008. The notice included the time, date, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

3. The hearing was held on February 13, 2008, in Waco, Texas. The Applicant, Protestant, and Staff were represented at the hearing.

4. The Applicant operates an equestrian events center outside of Hamilton, Texas. The center includes a private club and restaurant on the east side of facility.

5. The club is open Thursday through Saturday each week.

[3] The ALJ believes there could potentially be a better way to arrange the speakers in order to reduce the noise reaching the Moores' property, although no clear solution along these lines presented itself during the hearing.

6. A live country music band performs some Saturday nights and occasionally on Friday night. There were live performances on 28 days in 2007. The live performances occur between 9:00 p.m. and 1:00 a.m.

7. On warm nights, club management raises the three fourteen-foot wide retractable doors on the east side of the club for ventilation and to allow patrons to sit outside on the scenic porch.

8. The retractable doors from the facility face the Protestant's home, which is on top of a hill across the highway from the licensed premises.

9. The sound of the country music coming from the licensed premises is often audible and irritating to the Moores on nights when live bands perform.

10. The Applicant's manager monitor's the decibel level of the music durmg each live performance.

11. The bands were generally not shown to play particularly loud music. Instead, the problem is the open doors, the quiet country setting, and the topography of the area which transmits the music to the Protestant's home at close to the same level at which it leaves the licensed premises.

12. During the last year, the maximum volume of the music from the facility has ranged from 63 to 81 decibels during live band performances. These measurements were taken from a designated location on the licensed premises.

13. The Applicant's manager agreed the band that hit 81 decibels was too loud, and that band has been banned from future performances.

14. The Applicant has worked cooperatively with the Protestant and enforcement personnel in order to maintain the volume of the music at an appropriate level.

15. In order to comply with the statutory requirements prohibiting loud and noisy establishments, music from the licensed premises should be limited to 70 decibels as measured from the current measuring point on the Applicant's premises.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case. TEX. ALCO. BEV. CODE §§ 5.31, 5.33, 5.35, and 11.61.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. TEX. ALCO. BEV. CODE § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b).

3. Proper and timely notice of the hearing was provided as required in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Based on the Findings of Fact and Conclusion of Law, the manner in which the Applicant operates the licensed premises was not shown to warrant denial of the application.

5. Applicant's licenses should be renewed.

SIGNED April 9, 2008.

KERRY D. SULLIVAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS